

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SELIM ZHERKA and THE WESTCHESTER :
GUARDIAN, INC., :

Plaintiffs, :

v. :

JANET DiFIORE, individually, and THE COUNTY OF :
WESTCHESTER, :

Defendants. :
----- X

08 Civ. 3469 (CLB)

ANSWER

Defendants, by their attorneys Epstein Becker & Green, P.C., Of Counsel to Westchester County Attorney Charlene M. Indelicato, as and for their Answer to the Plaintiffs' Complaint, dated April 9, 2008, allege as follows:

Nature of the Action

1. Deny the allegations in paragraph 1 that Defendants violated the Plaintiffs' rights under the First Amendment of the United States Constitution in any way, or that Plaintiffs' are entitled to damages or injunctive relief; and affirmatively allege that the Plaintiffs' attempt to mischaracterize events as somehow "chilling" the Plaintiffs' exercise of First Amendment rights is meritless and constitutes vexatious litigation for an improper purpose; and respectfully refer all questions of law to the Court.

Jurisdiction

2. Admit the allegations in paragraph 2.

The Parties

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3.

4. Deny the allegations in paragraph 4, except admit that Defendant, Janet DiFiore (“DiFiore”), is the elected District Attorney of the County of Westchester, and that the Defendant, County of Westchester (the “County”), is a municipal corporate subdivision of the State of New York.

The Facts

5. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5, except admit that the March 20-21, 2007 edition of The Westchester Guardian contained an article entitled “Chief Judge Judith Kaye is Totally Out of Touch.”

6. Deny the allegations in paragraph 6, except admit that the text quoted appeared in The Westchester Guardian without the words in brackets.

7. Deny the allegations in the first paragraph 7, except admit that DiFiore telephoned Plaintiff Selim Zherka (“Zherka”) on March 21, 2007; DiFiore indicated she was not happy about part of an article just published by The Westchester Guardian; Zherka asked DiFiore if he could call her back; and DiFiore gave Zherka her private cell phone number for him to call her back.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in the second paragraph 7.

9. Deny the allegations in the first paragraph 8, except admit that later on March 21, 2007, Zherka telephoned DiFiore on her private cell phone to discuss the article; and, in substance, DiFiore told Zherka that she was not happy because the article contained a lie about her husband; she did not want her children reading lies about their father; she did not care what Zherka wrote about her or her office, including critical articles, but it was not right for him to publish a lie about her husband or to involve her family; Zherka said that he agreed with her that it was not right and asked what he could do; in response, she requested a retraction of the false statements about her

husband; and Zherka said that he had to figure out if he could do that, but that if he could not publish a retraction, her husband would be given an opportunity to respond to the article.

10. Deny the allegations in the second paragraph 8.
11. Deny the allegations in paragraph 9.
12. Deny the allegations in paragraph 10.
13. Repeat and reallege the responses to the allegations incorporated by reference in paragraph 11.
14. Deny the allegations in paragraph 12.

FIRST AFFIRMATIVE DEFENSE

The Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

At all relevant times, Defendants acted in good faith and are entitled to absolute and/or qualified immunity.

THIRD AFFIRMATIVE DEFENSE

The Plaintiffs' Complaint fails as a matter of law because the proper exercise by Defendants of their free speech rights under the First Amendment of the United States Constitution cannot serve as the basis for liability.

FOURTH AFFIRMATIVE DEFENSE

The Plaintiffs' Complaint fails as a matter of law because the purported claim under the First Amendment of the United States Constitution does not relate to a matter of public concern.

FIFTH AFFIRMATIVE DEFENSE

The conduct alleged by Plaintiffs is de minimus and insubstantial, and as such, the allegations fail to establish a claim under 42 U.S.C. § 1983 and/or the First Amendment of the United States Constitution.

SIXTH AFFIRMATIVE DEFENSE

The Plaintiffs' claims are barred by the Plaintiffs' culpable conduct and unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to mitigate their damages.

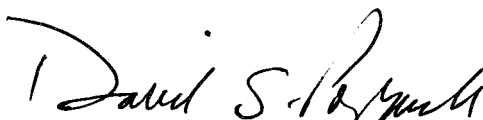
EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to punitive damages against Defendants for acts undertaken in official capacities.

WHEREFORE, Defendants demand judgment against the Plaintiffs dismissing the Complaint in its entirety, with prejudice, together with the costs, disbursements and reasonable attorneys' fees, and that this Court grant such other and further relief as this Court may deem just and proper.

Dated: June 3, 2008

EPSTEIN BECKER & GREEN, P.C.
Of Counsel to Westchester County Attorney,
Charlene M. Indelicato

By 

David S. Poppick (DP-2/16)
One Landmark Square, 18th Floor
Stamford, CT 06901

Telephone: (203) 348-3737

Facsimile: (203) 326-7587

and

Southern District of New York Office
and Post Office Address

250 Park Avenue

New York, New York 10177-0077

(212) 351-4500

dpoppick@ebglaw.com

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: **AFFIDAVIT OF**
: **SERVICE**
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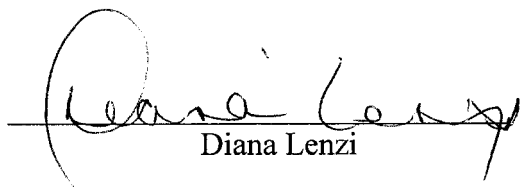
STATE OF CONNECTICUT)
)
COUNTY OF FAIRFIELD)

ss:


I, Diana Lenzi, being duly sworn, says: I am not a party to this action, I am over 18 years of age and am employed by Epstein Becker & Green, P.C.

On June 3, 2008, I served the within *Answer*, via U.S. Mail delivery, by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service upon the following:

Jonathan Lovett, Esq.
Attorney for Plaintiffs
Lovett & Gould, LLP
222 Bloomingdale Road
White Plains, NY 10605


Diana Lenzi

Sworn to before me this
3rd day of June, 2008.


Commissioner of the Superior Court